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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996
No. _____

Arnold C. Anchondo, William T. Beatty, Henry Garza, Louis A. Duran, Jr., Gary W. Johnson, Frank Leyvas, Frank Carranza, Jesse Encinas, Dee Harris, Ernest Lopez, Charles Masters, Basilio Murillo, Terrell Newman, Donald Peckham, Albert Ramos, Leroy Shelton, Octavio Sotelo, Charles Taghon and Manuel Valenzuela,

Petitioners,

vs.

Cyprus Minerals Company and Cyprus Copper Company, a wholly owned subsidiary d/b/a Cyprus Sierrita Corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS, DIVISION TWO

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QUESTION PRESENTED

Whether the "contract of employment" exception in § 1 of the Federal Arbitration Act (9 U.S.C. § 1 *et seq.*) was intended to exempt all employment contracts from the application of the Act.

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Petitioners,

vs.

Cyprus Minerals Company and Cyprus Copper Company, a wholly owned subsidiary d/b/a Cyprus Sierrita Corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS, DIVISION TWO

Petitioners respectfully petition for a Writ of Certiorari to review the order of the Arizona Court of Appeals in this case.

OPINIONS BELOW

The October 20, 1995 order of the Superior Court for the County of Pima, State of Arizona is unreported and is set forth in Appendix A. The January 3, 1996 order of the Arizona Court of Appeals, Division Two is unreported and is set forth in Appendix B. The January 23, 1996 order of the Arizona Court of Appeals, Division Two denying reconsideration is unreported and is set forth in Appendix

C. The June 21, 1996 order of the Arizona Supreme Court denying review is unreported and is set forth in Appendix D.

JURISDICTION

On August 29, 1995 petitioners filed a Motion for Partial Summary Judgment on the issue of whether an arbitration provision in an employee handbook was enforceable. On October 20, 1995 the trial court granted summary judgment on the arbitration issue and ordered the case to proceed to trial on the merits. On November 17, 1995 respondents filed a Petition for Special Action in the Arizona Court of Appeals, Division Two requesting interlocutory relief. On January 3, 1996 the Arizona Court of Appeals, Division Two issued an order reversing the trial court's October 20, 1995 ruling. On January 17, 1996 petitioners filed a Motion for Reconsideration in the Arizona Court of Appeals. The court denied reconsideration on January 23, 1996.

On February 7, 1996 petitioners filed a Petition for Review of the Court of Appeals ruling in the Arizona Supreme Court. Respondents filed a Cross-Petition for Review on February 26, 1996. On June 21, 1996 the Arizona Supreme Court issued an order denying both the Petition for Review and the Cross-Petition for Review.

On September 9, 1996 this Court granted a 15-day extension, up to and including October 4, 1996, in which to file a Petition for Certiorari.

This Court's jurisdiction is based on 28 U.S.C. § 1257.

STATUTES INVOLVED

This case involves the interpretation of the "contract of employment" exception to the Federal Arbitration Act (FAA) 9 U.S.C. §§ 1 *et seq*. The exception is set forth in 9 U.S.C. § 1 and provides, in relevant part, "[N]othing herein contained shall apply to contracts of employment of seaman, railroad employees, or any other class of workers engaged in foreign or interstate commerce."

STATEMENT OF THE CASE

Petitioners are 19 former employees of Cyprus Sierrita Corporation. Cyprus Sierrita Corporation is a subsidiary of Cyprus Minerals Company. Cyprus Sierrita operates copper and molybdenum

mines in Southern Arizona. In December of 1992, Cyprus Sierrita terminated petitioners as part of a corporate-wide reduction in force.

On November 3, 1993, petitioners filed the current lawsuit in the Superior Court for Pima County in the State of Arizona. Thereafter, petitioners filed an amended complaint alleging state law claims for breach of contract and wrongful termination. In specific, petitioners have alleged that Cyprus breached its promise that economic terminations would be determined on the basis of seniority and that the company discriminated against petitioners on the basis of their age.

In response to petitioners' complaint, respondents filed a motion for judgment on the pleadings in which they argued that the case was subject to mandatory arbitration pursuant to the FAA. In their motion, respondents argued that an arbitration provision in an Employee Handbook prepared by the company and unilaterally imposed on the employees many years after they began employment with the company effectively removed the petitioners' state constitutional right to a jury trial in favor of mandatory arbitration. The trial court denied this motion. Respondents then filed a motion to compel arbitration and requested an evidentiary hearing on the issue. Following the evidentiary hearing, the court ruled that there was a factual dispute regarding whether a valid arbitration agreement existed and ordered that the arbitration issue be resolved by a jury. The court subsequently ruled that a factual dispute existed regarding whether the arbitration provision applied to the current disputes.

Petitioners then filed a motion for partial summary judgment in which they argued that even if a valid arbitration agreement was found to exist which applied to the current disputes, nevertheless, such a provision would be unenforceable under Arizona law. Among other arguments, petitioners argued that Arizona's arbitration statute prohibits enforcement of arbitration agreements in employment contracts.

> The arbitration provision at issue fails under Arizona statutory law. Section 12-1517 of the Arizona Revised Statutes provides that Arizona's arbitration chapter "shall have no application to arbitration agreements between employers and employees or their respective representatives." Defendants have not disputed that the agreement between plaintiffs and defendants constitutes an employment contract. Since the arbitration clause at

> issue is contained in an employment contract, it is unenforceable under Arizona law.

Plaintiffs' Motion for Summary Judgment Re: Arbitration at 5.

In their responsive pleading, respondents argued that Arizona's statutory prohibition of arbitration provisions in employment contracts was preempted by federal law.

> The Federal Arbitration Act (FAA), 9 U.S.C. § 2, preempts any state law invalidating arbitration clauses falling under the Act. *See Southland Corp v. Keating*, 465 U.S. 1, 10 (1984) ("In enacting § 2 of the federal act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration").

Defendants' Brief in Opposition to Plaintiffs' Motion for Summary Judgment Re: Arbitration at 4-5. Respondents went on to note that the scope of the "contract of employment" exclusion in § 1 of the FAA was unresolved.

> Some courts have held that employment contracts are excluded from coverage under the FAA, but these decisions do not comport with the language of the Act. *See, e.g., Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305 (6th Cir. 1991). The last sentence of the FAA provides: "Nothing herein contained shall apply to contracts of employment of seaman, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Ignoring the reference to transportation workers in the FAA renders its language as surplusage, which is contrary to established rules of statutory construction. *DiCrisci v. Lyndon Guaranty Bank of New York*, 807 F.Supp. 947, 952-53 (W.D.NY 1992). *See also Miller Brewing Co. v. Brewery Workers*, 739 F.2d 1159, 1162 (7th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985) (§ 1 exclusion limited to workers employed in the transportation industry); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2nd Cir. 1972);

> *Dickstein v. Dupont*, 443 F.2d 783, 785 (1st Cir. 1971) (exception limited to employees involved in or closely related to the actual movement of goods in interstate commerce); *Tenney Engineering, Inc. v. United Electrical Radio & Machine Workers*, 207 F.2d 450, 452 (3rd Cir. 1953).

Id. at 5.

In reply to respondents' argument that the FAA preempts Arizona's statutory preclusion of arbitration agreements in employment contracts, petitioners argued that the FAA does not apply to employment contracts.

> Defendants' attempt to bring the arbitration provision under the Federal Arbitration Act (FAA) must fail. This arbitration provision is contained within an employment agreement and, thus, falls outside the scope of the FAA. Defendants acknowledge the existence of case law which supports exclusion. For example, defendants reference *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305 (6th Cir. 1991). In *Willis*, the Sixth Circuit specifically held that individual employment agreements do not come under the purview of the FAA. Justice Stevens, dissenting in *Gilmer v. Interstate/ Johnson Lane Corp.*, [500 U.S. 20 (1991)] [also] opined that arbitration clauses in employment contracts are exempt from coverage under the FAA.
>
> *United Electrical Radio & Mechanical Workers v. Miller Metal Products*, 215 F.2d 221, 224 (4th Cir. 1954) provides an additional basis for exclusion. There, the Fourth Circuit rejected a "transportation industry" limitation of the FAA stating "nor are we impressed by the argument that the exempting clause of the statute should be construed as not applying to employees engaged in the production of goods for interstate commerce as distinguished from workers engaged in transportation and interstate commerce." While plaintiffs were not in the business of transporting goods they did *produce* goods which entered the stream

> of commerce. Their jobs were also "closely related" to the actual movement of goods in interstate commerce. *See Dickstein v. Dupont*, 443 F.2d 783, 785 (1st Cir. 1971). Thus, plaintiffs are entitled to exemption from the FAA.

Plaintiffs Reply to Defendants' Response to Plaintiffs' Motion for Summary Judgment Re: Arbitration at 2-3.

The trial court granted petitioners' motion. Apparently, the court ruled that the FAA preempted Arizona's statutory preclusion of arbitration agreements in employment contracts. The court then ruled that under the FAA, even if the arbitration provision in the Employee Handbook was found to be valid and applied to the disputes at issue, nevertheless, such a provision would be unenforceable insofar as: (1) it deprived petitioners of their constitutional rights to trial by jury without a knowing and voluntary waiver, (2) the provision was beyond the reasonable expectations of the petitioners, (3) it was unconscionable and (4) there was no evidence of consideration for the provision. Accordingly, the trial court set the case for trial on the merits. (See Appendix A).

Respondents thereafter filed an interlocutory appeal and requested the Arizona Court of Appeals to reverse the trial court ruling and to order the trial court to compel arbitration pursuant to the provision in the Employee Handbook. In their Petition for Special Action, respondents raised the FAA issue in the Arizona Court of Appeals.

> The FAA applies to arbitration provisions contained in contracts "involving commerce." *Bayma v. Smith Barney, et al.*, 784 F.2d 1023, 1025 (9th Cir. 1986). The FAA does not apply to "contracts of employment of seaman, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. A number of courts have held that this exclusion is limited to contracts of workers *directly* involved in the movement of goods in interstate commerce. *See Miller Brewing Co. v. Brewery Workers*, 739 F.2d 1159, 1162 (7th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985) (§ 1 exclusion limited to workers employed in the transportation industry);

> *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2nd Cir. 1972); *Dickstein v. Dupont*, 443 F.2d 783, 785 (1st Cir. 1971) (exception limited to employees involved in or closely related to the actual movement of goods in interstate commerce); *Tenney Engineering, Inc. v. United Electrical Radio & Machine Workers*, 207 F.2d 450, 452 (3rd Cir. 1953). Neither the United State Supreme Court nor the Ninth Circuit has resolved this issue. *Mittendorf v. Stone Lumber Co.*, 874 F.Supp. 292 (D.Ore. 1994) (noting that the issue was unresolved in the Ninth Circuit and holding that the FAA does not govern such agreements, *but* also holding that an arbitration provision in an employment contract was nevertheless independently enforceable and required dismissal); *cf. Herring v. Delta Airlines, Inc.*, 894 F.2d 1020, 1023 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990).

Petition for Special Act at 16-17 n.2.

The appellate court accepted jurisdiction and reversed the trial court ruling. In its order, the Arizona Court of Appeals held that the FAA applied to the arbitration provision in the Employee Handbook. Pursuant to the federal statute, the court concluded that the petitioners could be deprived of their state constitutional rights even in the absence of a knowing and intelligent waiver. The court denied respondents' request to compel arbitration, however, insofar as it concluded that factual issues existed regarding the issues of reasonable expectations, unconscionability and lack of consideration. (See Appendix B).

Petitioners subsequently petitioned the Arizona Supreme Court for discretionary review of the Court of Appeals ruling. In their Petition for Review, petitioners once again raised the FAA issue.

> The Court of Appeals held that the FAA preempts state law. This ruling is significant because under Arizona's arbitration act (Ariz. Rev. Stat. §§ 12-1501 et seq.), arbitration provisions in employment contracts are not enforceable. *See* Ariz. Rev. Stat. § 12-1517. Thus, unless the federal statute preempts state law, the plaintiffs cannot be compelled to submit their claims to arbitration.

The issue of the scope of preemption under the FAA remains unresolved. The United States Supreme Court has held that the federal act preempts state law on the issue of arbitrability with respect to those contracts falling under the act. *See, e.g., Southland Corp. v. Keating*, 465 U.S. 1, 16 n.11, 104 S.Ct. 852, 861 n.11 (1984); *Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 103 S.Ct. 927 (1983). However, section 1 of the Act (9 U.S.C. § 1) provides an exception to the otherwise all inclusive preemptive effect of the statute. Section 1 provides in part:

> Nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

The circuit courts are split regarding the meaning of the exception outlined in section 1 of the Act. Several courts have held that the FAA does not apply to any employment contract. *See Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 310-11 (6th Cir. 1991); *United Food & Commercial Workers v. Safeway Stores, Inc.*, 889 F.2d 940, 944 (10th Cir. 1989); *Herring v. Delta Airlines, Inc.*, 894 F.2d 1020, 1023 (9th Cir. 1990); *Domino Sugar Corp. v. Sugar Workers Local*, 10 F.3d 1064, 1067 (4th Cir. 1993); *United Electrical Radio & Machine Workers v. Miller Metal Products, Inc.*, 215 F.2d 221, 224 (4th Cir. 1954); *Lincoln Mills of Alabama v. Textile Workers Union of America*, 230 F.2d 81, 86 (5th Cir. 1956), *rev. on other grounds*, 353 U.S. 448, 775 S.Ct. 912 (1957). However, other circuit courts have held that the limiting language of section 1 should be narrowly interpreted to include only those workers directly involved in interstate commerce. *See Dickstein v. Dupont*, 443 F.2d 783, 785 (1st Cir. 1971); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2nd Cir. 1972); *Tenney Engineering, Inc. v. United Electrical Radio & Machine Workers of*

America, 207 F.2d 450, 453 (3rd Cir. 1953); *Miller Brewing Co. v. Brewery Workers Local Union No. 9*, 739 F.2d 1159, 1162 (7th Cir. 1984); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 600-601 (6th Cir. 1995).

On June 21, 1996, the Arizona Supreme Court denied discretionary review.

REASONS FOR GRANTING THE PETITION FOR CERTIORARI

A. There is a Split in the Circuit Courts Regarding the Scope of the "Contract of Employment" Exception in Section 1 of the Federal Arbitration Act.

Since the FAA was signed into law in 1925, this Court has had several opportunities to explain the scope of the "contract of employment" exception set forth in Section 1 of the Act. On each occasion, the Court has decided the case without resolving the issue. As a result, the circuit courts have reached inconsistent results in interpreting the scope of the statutory exception.

This Court was first presented with the issue of the scope of the FAA's "contract of employment" exception in *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957). At the time the Court issued its opinion in the *Lincoln Mills* case, the circuit courts had already reached inconsistent results in their interpretation of Section 1 of the Act. *See Signal-Stat Corp. v. Local 475, United Electrical Radio & Machine Workers of America*, 235 F.2d 298, 302 (2nd Cir. 1956), *cert. denied*, 354 U.S. 911 (1957), *reh. denied*, 355 U.S. 852 (1957) (noting that the 1st, 3rd and 6th Circuits had applied the FAA to labor disputes, while the 4th and 5th Circuits had held that the statutory exception in Section 1 of the Act excluded labor disputes from the FAA).

Despite the inconsistency in the lower court rulings, this Court failed to resolve the issue in the *Lincoln Mills* case. In his dissenting opinion, Justice Frankfurter admonished the court for failing to resolve the issue:

> In 1925 Congress passed the United States Arbitration Act, 9 U.S.C. § 1 et seq., making executory

> agreements to arbitrate specifically enforceable in the federal courts, but explicitly excluding "contracts of employment" of workers engaged in interstate commerce from its scope. Naturally enough, I find rejection, though not explicit, of the availability of the Federal Arbitration Act to enforce arbitration clauses in collective bargaining agreements in the silent treatment given that Act by the Court's opinion. If an act that authorizes the federal courts to enforce arbitration provisions in contracts generally, but specifically denies authority to decree that remedy for "contracts of employment" were available, the Court would hardly spin such power out of the empty darkness of Section 301 [of the Labor Management Relations Act]. I would make this rejection explicit, recognizing that when Congress passed legislation to enable arbitration agreements to be enforced by the federal courts, it sought fit to exclude this remedy with respect to labor contracts.

Lincoln Mills, supra, 353 U.S. at 466 (Frankfurter, J., dissenting).

Despite Justice Frankfurter's admonition in the *Lincoln Mills* case, in the years following *Lincoln Mills* the circuit courts ruled that the "contract of employment" exception in Section 1 of the Act should be narrowly construed and permitted the application of the Act to most employment contracts. *See Dickstein v. DuPont*, 443 F.2d 783 (1st Cir. 1971); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064 (2nd Cir. 1972); *Pietro Scalzitti Co. v. Int'l Union of Operating Engineers, Local No. 150*, 351 F.2d 576 (7th Cir. 1965); *Miller Brewing Co. v. Brewery Workers Local Union No. 9, AFL-CIO*, 736 F.2d 1159 (7th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985); *but see Herring v. Delta Airlines, Inc.*, 894 F.2d 1020 (9th Cir. 1990), *cert. denied*, 494 U.S. 1016 (1990); *United Food & Commercial Workers, Local Union No. 7R v. Safeway Stores, Inc.*, 889 F.2d 940 (10th Cir. 1989); *Service Employees Int'l Union Local No. 36, AFL-CIO v. Office Center Services, Inc.*, 670 F.2d 404 (3rd Cir. 1982) (questioning the continued vitality of the Third Circuit's opinion in *Tenney Engineering, Inc. v. United Electrical Radio & Machine Workers of America, Local 437*, 207 F.2d 450 (3rd Cir. 1953)).

In 1991, this Court had another opportunity to resolve the conflict in the lower court rulings interpreting the "contract of employment" exception to the FAA. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the issue was briefed and argued to the Court. As in the *Lincoln Mills* case, the Court resolved the *Gilmer* case without ruling on the "contract of employment" exclusion issue. *Id.* at 25 n.2.

Since this Court's decision in *Gilmer*, a majority of courts have narrowly construed the statutory exception and ruled that most employment contracts are within the scope of the FAA. *See Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 597-601 (6th Cir. 1995); *Rojas v. T.K. Communications*, Inc., 87 F.3d 745 (5th Cir. 1996); *Albert v. National Cash Register Co.*, 874 F.Supp. 1324, 1326-27 (S.D. Fla. 1994); *Cherry v. Wertheim Schroder & Co.*, 868 F.Supp. 830, 834-35 (D.S.C. 1994); *Kropfelder v. Snap-On Tools Corp.*, 859 F.Supp. 952, 958 (D.Md. 1994); *Crawford v. West Jersey Health Systems*, 847 F.Supp. 1232, 1240-42 (D.N.J. 1994); *Scott v. Farm Family Life Ins. Co.*, 827 F.Supp. 76, 77-79 (D.Mass. 1993); *Hull v. NCR Corp.*, 826 F.Supp. 303, 307 (E.D. Mo. 1993); *DiCrisci v. Lyndon Guaranty Bank*, 807 F.Supp. 947, 853 (W.D.N.Y. 1992). Many courts, however, have broadly construed the "contract of employment" exception and ruled that all employment contracts are excluded from the FAA. *See Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 311 (6th Cir. 1991); *Pritzker v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 7 F.3d 1110, 1119-20 (3rd Cir. 1993); *Domino Sugar Corp. v. Sugar Workers Local Union No. 392 of the United Food & Commercial Workers Int'l Union*, 10 F.3d 1064, 1067 (4th Cir. 1993); *Wedding v. Univ. of Toledo*, 89 F.3d 316, 319 n.2 (6th Cir. 1996); *Arce v. Cotton Club of Greenville, Inc.*, 883 F.Supp. 117, 118-23 (N.D.Miss. 1995); *see also Armijo v. Prudential Ins. Co. of America*, 72 F.3d 793, 802 (10th Cir. 1995) (Jenkins, J., concurring). Indeed, the confusion regarding the scope of the "contract of employment" exception is such that the Sixth Circuit has recently issued contradictory rulings. *See Willis, supra*; *Asplundh, supra*; and *Wedding, supra*.

B. The Lower Court's Ruling was Erroneous.

The issue raised in this petition concerns the proper interpretation of the "contract of employment" exception of Section 1 of

the FAA. More specifically, the question is raised regarding Congress' intent in adopting the exclusionary language in Section 1 of the Act. The legislative history of the Act is set forth in some detail in the Petitioners' brief in *General Electric Co. v. Local 205, United Electrical Workers*, 353 U.S. 547 (1957) and the amicus brief submitted by the American Federation of Labor and Congress of Industrial Organizations in *Gilmer v. Interstate-Johnson Lane Corp.*, supra. This legislative history makes clear that the Act was not intended to encompass employment agreements.

The FAA was drafted and sponsored by the Committee on Commerce, Trade and Commercial Law of the American Bar Association (ABA). In December 1922, the ABA's draft of the federal act was simultaneously introduced as a bill in the Senate (S.4214) and in the House of Representatives (H.R. 13522). 64 Cong. Rec. 732, 797 (1922). Section 2 of the ABA's draft, as it was introduced in Congress, made valid and enforceable written arbitration provisions in "any contract or maritime transaction or transaction involving commerce." While Section 1 of the ABA draft defined "commerce", it did not contain any exclusionary language regarding employment contracts.

Representatives of labor were opposed to the ABA proposal. Andrew Furuseth, the President of the International Seamans Union, strongly objected to what was perceived as a "compulsory labor" bill. *See* Proceedings of the 26th Annual Convention of the International Seamans Union of America 203 (1923). Members of the American Federation of Labor also objected to the bill. *See* Proceedings of the 45th Annual Convention of the American Federation of Labor 52 (1925). The basis of labor's opposition to the bill was the fear that weak unions or individuals would be required to submit to arbitration clauses as a condition of employment and that the arbitral decision makers would, as a practical matter, be under the control of the employers. *See* 53 A.B.A. Rep. 351-352 (1928).

At the hearing on the proposed Arbitration Act before the Senate Subcommittee to which the bill had been referred, the chairman of the ABA Committee on Commerce, Trade and Commercial Law, Mr. Piatt, referred to the objections raised by the Seamans Union. Mr. Piatt made clear that "it was not the intention of this bill to make an industrial arbitration in any sense." Hearing before a Subcommittee of the Senate Committee on the Judiciary on S. 4213 and S. 4214, 67th Cong., 4th

Sess. 9 (1923). Mr. Piatt then suggested that the committee adopt exclusionary language to clarify the intent of the Act.

> . . . and so I suggest that in as far as the committee is concerned, if your honorable committee should feel that there is any danger of that, they should add to the bill the following language 'that nothing herein contained shall apply to seamen or any class of workers in interstate and foreign commerce.' *It is not intended that this shall be an Act referring to labor disputes at all.* It is purely an act to give merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it.

Id. (emphasis added).

In addition to the comments by the chairman of the ABA committee which drafted the bill, then Secretary of Commerce Herbert Hoover submitted a letter to the Senate Subcommittee on the day of the hearing also proposing exclusionary language to exempt labor agreements from the scope of the act. In his letter, Secretary Hoover urged the Congress regarding the necessity of passing a "commercial arbitration act." In order to eliminate labor's objection, Secretary Hoover suggested amending the proposed bill to include the present exclusionary language of Section 1. *Id.* at 14.

The 67th Congress adjourned before acting on the proposed bill. At the next session of Congress, a slightly revised version of the bill was introduced in both the House and the Senate. The first section of the revised bill contained the exclusionary language which had been proposed by Secretary Hoover and which presently appears in Section 1 of the Act. Joint Hearings before the Subcommittees of the Committees on the Judiciary on S. 1005 and H.R. 646, 68th Cong., 1st Sess. (1924).

The subject matter of the joint committee hearing on the bill was understood to be limited to "arbitration of interstate *commercial* disputes." *Id.* at 1 (emphasis added). The record of the hearing reflects the commercial nature of the bill. Over 70 commercial organizations which endorsed the bill were present at the hearing. Despite the vocal opposition to the earlier version of the bill, not a single representative of labor appeared at the hearings to oppose the revised bill. Nor was

there any testimony or suggestion by anyone that the revised bill was intended to apply to employment agreements. As a result, the House and Senate Reports of the joint subcommittee hearing contain no reference that Congress intended that labor disputes be included within the scope of the Act. H.R. Rep. No. 96, 68th Cong., 1st Sess. (1924); Sen. Rep. No. 536, 68th Cong., 1st Sess. (1924).

Ian MacNeil in his book, *American Arbitration Law*, noted that the "intent of Congress" with respect to the FAA is not to be found so much in the legislative history of the Act as in the ABA's evolution of the bill.

> The intention of Congress to be sought in interpreting such legislation cannot be quite the same as it is respecting legislation Congress itself has crafted. When Congress itself crafts legislation, the search is to ascertain what it understood itself to be crafting. When it simply enacts legislation presented to it, the proper question is how Congress understood what was presented and upon which it put its stamp of approval. To seek an independent intention in such cases is to seek something that never existed, even in the somewhat ethereal world of legislative intention. Similarly, to the extent that the idea of congressional purpose is an appropriate subject of inquiry, Congress' purpose in such legislation of adhesion is entirely derivative from the purpose of those presenting the legislation to Congress. In such cases, where the language of the statute is unclear, if we wish to ascertain Congress' intention and purpose, our focal point must be what Congress understood to be the goals of those presenting the fully drafted statute.

I. MacNeil, *American Arbitration Law* at 108 (1992). Throughout the drafting and explanation of the proposed Arbitration Act, the clearly expressed intention was to reach only commercial contracts. Indeed, representatives of the ABA committee which drafted and sponsored the proposed legislation emphatically testified that the Act was not intended to apply to labor disputes in any industry.

This common understanding of the scope of the Act was well understood in the years following its passage. For example, shortly

after passage of the Act, the American Federal of Labor noted that the statutory exclusion exempted labor disputes from the Act.

> Protests from the American Federation of Labor and the International Seamans Union brought about an amendment which provides that "but nothing herein contained shall apply to contracts of employment of seaman, railroad employees, or any other class of workers engaged in foreign or interstate commerce." This exempts labor from the provisions of the law, although its sponsors denied that there was any intention to include labor disputes.

Proceedings of the 45th Annual Convention of the American Federation of Labor 52 (1925).

The ABA Committee on Commerce, Trade and Commercial Law's post-enactment conduct also demonstrates that its members understood the statutory exclusion to exempt all employment contracts from the scope of the Act. The year following passage of the Act, the committee began work on a new bill which would have extended arbitration into the labor field. Noting that "Congress has already enacted a statute providing for a method for the settlement of commercial disputes by means of arbitration," the committee stated that it was "convinced that a similar statute may properly be enacted by Congress providing for the settlement in like manner of industrial disputes. . .." 51 A.B.A. Rep. 394 (1926).

During the next two years, the ABA committee worked on a proposed bill to extend arbitration to the field of labor disputes. In 1928, the committee completed a draft of a bill which would have made enforceable written arbitration agreements between employers and employees "concerning terms of employment or conditions of labor." 53 A.B.A. Rep. 376 (1928). In its report, the committee noted that labor opposition had prevented "application of the [FAA] generally to agreements to arbitrate industrial controversies as well as commercial controversies." *Id.* at 351.

Representatives of labor refused to endorse the ABA draft proposal. *See* 19 American Federation of Labor Weekly News Services, No. 5 (April 18, 1929). Because of labor's opposition, the ABA committee concluded that "public opinion is not yet ready for this legislation." 55 A.B.A. Rep. 328 (1930).

Subsequent events also demonstrate that the FAA was not intended to apply to labor disputes. In 1942, the American Arbitration Association drafted a bill to amend the FAA (S. 2350, 77th Cong., 2nd Sess.). 88 Cong. Rec. 2071 (1942). Among other things, the Arbitration Association's proposed bill would have eliminated the exclusionary language of Section 1 of the Act and amended the Act to include a new Section 2A expressly providing for the enforcement of arbitration agreements between labor organizations and employers. An explanatory statement accompanying the bill noted that the purpose of the proposed amendment was "extension of the [FAA] to embrace written agreements to arbitrate labor controversies." *Id.* at 2072. The bill, however, was never reported out of committee.

At the time of the enactment of the FAA, and for years afterwards, it was well understood that Section 1 of the Act removed all employment contracts from the Act's coverage. All of the evidence points to the conclusion that the sponsors of the Act and Congress intended the Act to apply only to commercial transactions. To the extent that the court below (as well as other courts) have limited the "contract of employment" exception to workers within the transportation industry and thus permitted most labor disputes to come within the scope of the Act, such an interpretation is clearly inconsistent with the legislative history of the Act.

C. The Issue Raised Has Important Public Policy Ramifications.

The Arizona Court of Appeals held that the FAA is applicable to the arbitration provision in the Cyprus Employee Handbook. This ruling is significant because under Arizona's arbitration act (Ariz. Rev. Stat. § 12-1501 *et seq.*), arbitration provisions in employment contracts are not enforceable. Thus, unless the federal statute is applicable, petitioners cannot be compelled to submit their claims to arbitration.

Arizona's arbitration statute is based on the Uniform Arbitration Act. The Uniform Act was approved by the National Conference of Commissioners on Uniform State Laws in 1955. 7 Uniform Laws Annot. 1 (1985). Section 1 of the Uniform Act provides:

> A written agreement to submit any controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between

> the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. This act also applies to arbitration agreements between employers and employees or between their respective representatives unless otherwise provided in their agreement.

Id. at 5.

Arizona adopted its version of the Uniform Act in 1962. As originally introduced, the bill permitted arbitration provisions in employment contracts:

> A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable save upon such grounds as exist at law or in equity for the revocation of any contract. Arbitration agreements which incorporate the rules either of the American Arbitration Association or the American Institute of Architects or of special provisions in labor agreements shall be operative in accordance with the terms of those rules or provisions. An award in a matter between employers and employees or between their respective representatives shall not be subject to confirmation, vacation, modification or judgment, but rather shall be operative in accordance with the terms of the agreement, and shall be set aside only for fraud.

H.B. 127, 25th Legislature of the State of Arizona, 2nd Reg. Sess. (1962). Before it was enacted, however, H.B. 127 was amended by the Judiciary Committee of the Arizona House of Representatives to preclude the enforcement of arbitration provisions in employment contracts. The committee removed the second and third sentences of the proposed bill. Additionally, the committee added the following language: "This act shall have no application to arbitration agreements between employers and employees or their respective representatives." Journal of the House of Representatives, 25th Legislature of the State of Arizona, 2nd Sess. 419, 758-59 (1962). The bill was subsequently adopted with the amendments of the House Judiciary Committee. The

language added by the Judiciary Committee now appears as Ariz. Rev. Stat. § 12-1517.

In adopting its arbitration act, the Arizona legislature was concerned that employees might be forced to choose between employment and their constitutional rights. For that reason, the Arizona legislature chose to exempt employment contracts from the State's arbitration act. Because the FAA preempts conflicting state law, *see Southland Corp. v. Keating*, 465 U.S. 1, 10-11 (1984), the lower court ruling that the FAA applies in this case effectively eliminates the worker protection policy adopted by the Arizona legislature. While Congress clearly has the power to enact legislation which supersedes state law, the record clearly demonstrates that Congress did not intend to preempt state regulation of arbitration provisions in employment contracts.[1]

This court recently reiterated the framework used to resolve preemption issues. In *Medtronic, Inc. v. Lohr*, ___ U.S. ___, 116 S.Ct. 2240, 2250 (1996), the Court stated that there is an "assumption that the historic police powers of the states [are] not to be superseded by [a] federal act unless that was the clear and manifest purpose of Congress." It is no doubt true that in enacting the FAA Congress intended to facilitate the enforcement of arbitration agreements in *commercial* transactions. It is equally clear, however, that Congress intended that *some* employment contracts be excluded from the scope of the act. The only question is whether Congress intended the "contract of employment" exception to be broadly applied to all employment contracts or whether the exception was to apply only to a narrow spectrum of workers. What is not at all in question is that the legislative history of the Act is completely void of any reference that the Act was intended to apply to some, but not all, labor disputes.

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[1]Other states besides Arizona preclude the enforcement of arbitration provisions in employment contracts. *See Ark. Code Ann.* § 16-108-201(b) (Michie Supp. 1995); *Idaho Code Ann.* § 7-901 (1990); *Iowa Code Ann.* § 679A.1(2) (West 1987); *Kan. Stat. Ann.* § 5-401(c) (Supp. 1995); *Ken. Rev. Stat. Ann.* § 417.050 (1992); *N.C. Gen. Stat.* § 1-567.2(b)(2) (1983) (article does not apply to employment contracts unless contract provides that article will apply); *S.C. Code Ann.* § 15-48-10 (Law. Co-op. Supp. 1995) (article does not apply to employment contracts unless contract provides that article will apply).

It has been suggested that it is illogical to give an expansive meaning to the phrase "involved in commerce" used in § 2 of the act while at the same time giving a narrow meaning to the phrase "engaged in commerce" used in § 1 of the act. Indeed, then professor Cox stated that one may "dogmatically assert" that such an interpretation is "clearly wrong." A. Cox, *Grievance Arbitration in the Federal Courts*, 67 Harv. L. Rev. 591, 599 (1954). Rather, Professor Cox reasoned that the two phrases should be read coextensively. *Id.*

Interpreting "engaged in commerce" more narrowly than "involved in commerce" creates an anomalous result. Under the narrow view of the "contract of employment" exception, arbitration provisions are unenforceable in labor disputes involving workers directly involved in interstate commerce, while such provisions would be enforceable in disputes involving workers who are only indirectly involved in interstate commerce. Neither the lower court, nor any other court, has shown a "clear and manifest purpose" of Congress to accomplish such a result. In the absence of such a showing, a presumption exists that Congress did not intend to preempt state regulation of labor arbitration.

In arguing that the FAA does not apply to this case, petitioners do not mean to suggest that the Court should disavow or denigrate the usefulness of arbitration. On the contrary, petitioners agree with the policy underlying the FAA--i.e., allowing parties to *voluntarily* forego the time and expense of litigation.[2] *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, ___ U.S. ___, 115 S.Ct. 1212, 1216 (1995) (arbitration is a matter of consent and parties are generally free to

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[2]In the Civil Rights Act of 1991, Congress specifically provided for the use of alternative dispute resolution including arbitration. *Pub. L.* 102-166 § 118 (42 U.S.C. § 1981 note). In enacting Section 118, the framers of the Act clarified that the provision "contemplates the use of voluntary arbitration to resolve specific disputes after they have arisen, not coercive attempts to force employees in advance to forego statutory rights." 127 Cong. Rec. H9530 (daily ed. Nov. 7, 1991) (statement of Rep. Edwards); *see also* 137 Cong. Rec. S.15478 (daily ed. October 30, 1991) (statement of Sen. Dole) (arbitration is encouraged only "where the parties knowingly and voluntarily elect to use these methods"). In considering the Civil Rights Act, Congress rejected a legislative proposal that would have encouraged the use of prospective mandatory arbitration citing concerns that such an approach would enable employers to "refuse to hire workers unless they signed a binding statement waiving all rights to file Title VII complaints." H.R. Rep. No. 40(I), 102nd Cong., 1st Sess. 104 (1991).

structure arbitration agreements as they see fit); *Allied-Bruce Terminix, Inc. v. Dobson*, ___ U.S. ___, 115 S.Ct. 834, 842-843 (1995) (arbitration provides an alternative mechanism for resolving disputes which is often less expensive and more expeditious than litigation). What petitioners do suggest is that many lower courts have extended the scope of the FAA beyond that intended by Congress and thus interfered with the sovereign power of the states.

The ramifications of this Court's failure to act in *Lincoln Mills* and *Gilmer* go beyond the unequal treatment of workers in different states. The uncertainty regarding the scope of the law has led to increased litigation over the forum in which to resolve employment disputes. Indeed, this case is an example of the problems caused by the uncertainty on this issue. For nearly three years, the parties have fought over the arbitrability issue. There have been no less than eight motions in the trial court as well as the appellate proceedings which have resulted in over 1,000 hours of attorney time and tens of thousands of dollars in expenses arguing about the forum in which to resolve the substantive disputes between the parties. Until this Court resolves the conflict in the lower courts, similar wasted efforts will most certainly occur.

CONCLUSION

In enacting the FAA Congress clearly intended to facilitate the enforcement of arbitration agreements in *commercial* transactions. It is indisputable that § 1 of the Act imposes some limitation to the scope of the Act. The issue remains unresolved whether Congress intended a narrow exception for certain employment contracts, or rather, whether Congress intended to exempt the entire field of labor disputes from the scope of the Act. That uncertainty will remain until this Court chooses to act.

Accordingly, the Court should grant certiorari in this case in order to resolve the scope of the "contract of employment" exception to the FAA.

Respectfully submitted,

THE LANGERMAN LAW OFFICES

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October 3, 1996.

Appendix A

ARIZONA SUPERIOR COURT, PIMA COUNTY

Judge: HON. ROBERT B. BUCHANAN Case No. 297607
Court Reporter: none Date: October 20, 1995

HENRY GARZA, et al.,
vs.
CYPRUS MINERAL CO., et al.,

MINUTE ENTRY

UNDER ADVISEMENT RULING:

IT IS ORDERED Plaintiffs' Motion for Summary Judgment Re: Arbitration is granted.

The court finds and concludes that the arbitration provision at issue and contained in the June 1992 Cyprus Sierrita employee handbook is invalid and unenforceable as a matter of law for the reasons that it deprives plaintiffs of their constitutional rights to court access and trial by jury which were not knowingly, voluntarily and intelligently waived; the provision constitutes a contract of adhesion; it is beyond the reasonable expectations of plaintiffs; it is unconscionable, lacks consideration and mutual consent.

IT IS THEREFORE ORDERED defendant's defense of arbitration is dismissed and stricken, the October 31, 1995 trial on the issue is vacated, and that the case bet set for a jury trial on the issue of damages.

cc:
Honorable Robert B. Buchnan (sic)
Court Administrator
Under Advisement Clerk
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Appendix B

COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

CYPRUS MINERALS COMPANY AND CYPRUS COPPER COMPANY A WHOLLY OWNED SUBSIDIARY, D/B/A CYPRUS SIERRITA CORPORATION, Petitioner, v. THE HONORABLE ROBERT B. BUCHANAN, A JUDGE FOR THE SUPERIOR COURT OF THE STATE OF ARIZONA, COUNTY OF PIMA Respondent, and ARNOLD C. ANCHONDO, WILLIAM T. BEATTY, HENRY GARZA, LOUIS A. DURAN, JR., GARY W. JOHNSON, FRANK LEYVAS, FRANK CARRANZA, JESSE ENCINAS, DEE HARRIS, ERNEST LOPEZ, CHARLES MASTERS,BASILIO MURILLO, TERRELL NEWMAN, DONALD PECKHAM, ALBERT RAMOS, LEROY SHELTON,OCTAVIO SOTELO, CHARLES TAGHON AND MANUEL VALENZUELA, Real Parties in Interest.	)	ORDER 2 CA-SA 95-0166 Department A Pima County Cause No.297607

Based upon the record before this court, it appears that the employment contracts at issue here are subject to the Federal Arbitration

Act, 9 U.S.C. §§ 1-16 (FAA). See generally Asplundh Tree Expert Company v. Bates, ___ F.2d ___, 1995 WL 736623 (6th Cir. 1995) and cases cited therein. That act preempts the application of state law to defeat the enforceability of the arbitration provision "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Thus, while statutes and caselaw requiring judicial resolution of disputes or otherwise rendering arbitration agreements revocable or unenforceable are preempted, e.g., Bayma v. Smith Barney, Harris Upham and Company, Inc., 784 F.2d 1023 (9th Cir. 1986), generally applicable state law of contract formation is not. Perry v. Thomas, 482 U.S. 483, 107 S. Ct 2520, 96 L. Ed. 2d 426 (1987).

The respondent granted summary judgment on the grounds that the arbitration provision 1) deprives the real parties in interest of their state constitutional rights to court access and trial by jury without a knowing, voluntary and intelligent waiver; 2) constitutes a contract of adhesion; 3) is beyond the reasonable expectations of the real parties in interest; 4) is unconscionable; and 5) lacks consideration and mutual consent. The first ground is clearly directed at "the uniqueness of an agreement to arbitrate," Perry v. Thomas, 482 U.S. at 492 n. 9, 107 S. Ct. at 2527 n. 9, and is therefore preempted by the FAA. The second, third and fifth grounds require resolution of disputed factual issues and are therefore inappropriate for summary judgment. Cf. Phoenix Baptist Hospital v. Aiken, 179 Ariz. 289, 877 P.2d 1345 (App. 1994) (material issue of fact as to whether patient's husband would have signed agreement to pay patient's medical expenses if he had known agreement attached liability to his separate property precluded summary judgment).

The fourth ground, unconscionability, is a matter of law to be determined by the court. Maxwell v. Fidelity Financial Services, Inc., 204 Ariz. Adv. Rep. 3 (11/21/95). That determination must be based on factual findings made after the parties have had an opportunity to present evidence to the court and develop a record as to the setting, purpose and effect of the arbitration provision. See generally Maxwell.

The respondent made no findings, and it is therefore impossible to discern the basis for his conclusion. The real parties in interest argued below that the provision was unconscionable because arbitration would protect the petitioner from large jury verdicts, including punitive damages. A finding of unconscionability on this ground, based as it is on a direct attack on arbitration provisions generally, is preempted by the FAA. The record here is insufficient to support the respondent's conclusion that the arbitration provision is otherwise unconscionable.

ORDERED: The court accepts jurisdiction. The respondent's minute entry order of October 20, 1995, is vacated and the matter is remanded for further proceedings. The parties shall bear their own attorneys' fees.

Judges Fernandez and Pelander concurring.

DATED: January 3, 1996

Joseph M. Livermore
Presiding Judge

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Re-mailed this 5th day of January, 1996

Hon. Robert Buchanan, Judge
Pima County Superior Court
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Tucson, AZ 85701
(Certified copy)

James N. Corbett, Clerk
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Andy Dowdle
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Appendix C

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

January 23, 1996

RE: CYPRUS MINERALS V. ANCHONDO; ET AL.
2 CA-SA 95-0166

Pima County Superior Court Cause No. 297607

The following action was taken by the Court of Appeals for the State of Arizona, Division Two, Department A on January 19, 1996,

ORDERED: Motion for Reconsideration Re: Petition for Special Action is DENIED.

Presiding Judge Livermore, Judge Fernandez and Judge Pelander participated in the determination of this matter.

JOYCE A. GOLDSMITH, Clerk

Appendix D

SUPREME COURT
STATE OF ARIZONA

June 21, 1996

RE: CYPRUS MINERALS COMPANY vs. HON. ROBERT BUCHANAN-PIMA CO
SUP CT/ARNOLD C. ARCHONDO et al
Supreme Court No. CV-96-0131-PR
Court of Appeals No. 2 CA-SA 95-0166
Pima County No. 297607

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on June 19, 1996, in regard to the above-referenced cause:

ORDERED: Petition for Review [Arnold C. Anchondo, et al.] = DENIED.

FURTHER ORDERED: Cross-Petitioners' Motion to Modify the Record on Appeal = DENIED.

FURTHER ORDERED: Cross-Petition for Review [Cyprus Minerals Co.] = DENIED.

FURTHER ORDERED: Request for Attorneys' Fees [Arnold C. Anchondo, et al.] = DENIED.

Record returned to Court of Appeals, Division Two, Tucson, this 21st day of June, 1996.

NOEL K. DESSAINT, Clerk

TO:

Jon E. Pettibone, Esq. and Colleen A.
Scherkenbach, Esq.,
Quarles & Brady
Richard W. Langerman, Esq., Amy G. Langerman,
Esq.,
Adrienne K. Wilson, Esq., and Justin G.
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